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No. 662

In the Supreme Court of the United States

OCTOBER TERM, 1962

TRINITY TRUST COMPANY, LTD.

and

OCEAN TRUST COMPANY, LTD., PETITIONERS

v.

ROBERT [illegible], ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 662

TRENT TRUST COMPANY, LTD.

and

COOK TRUST COMPANY, LTD., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1928, petitioner Trent Trust Company as trustee for German beneficiaries was held liable for breach of trust in failing to bring suit under Section 9 of the Trading With the Enemy Act, 50 U.S.C. App. 9, to obtain recovery—and thus prevent the sale at an unreasonably low price—of property which had been taken by the Alien Property Custodian during World War I. Trent was required to pay damages to the beneficiaries, *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609 (C.A. 9), rehearing denied, 31 F. 2d 553 (C.A. 9).

certiorari denied, 279 U.S. 862.[1] The present suit was brought in the district court in 1959 to review the disallowance by the Attorney General[2] of petitioner's debt claim, under Section 34(f) of the Trading With the Enemy Act, as amended, 50 U.S.C. App. 34(f), against funds of the German government held by the Custodian.

As basis for this claim, petitioners rely on paragraph 2 of the Annex to Article 297 of the Treaty of Versailles (applicable between Germany and the United States by incorporation into the Treaty of Berlin), which provides in pertinent part that:

> * * * [N]o claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power.

They maintain that Trent's failure to institute Section 9 proceedings to recover back the property was an "omission under or in accordance with" the Trading With the Enemy Act within the meaning of

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[1] Trent's petition for certiorari in the 1928 litigation alleged that the Ninth Circuit had ignored the identical treaty provision upon which its current petition is based. See No. 811, Oct. Term, 1928: Brief in Support of Petition for Certiorari, pp. 2, 9, 27–28; and Petition for Rehearing of Order Denying Petition for Writ of Certiorari, pp. 17–18. This Court denied certiorari. 279 U.S. 862.

[2] By Executive Order No. 9788 (11 F.R. 11981, Oct. 14, 1946), the Office of the Alien Property Custodian was terminated and its powers and functions transferred to the Attorney General. The term "Custodian" will be used to refer to the Alien Property Custodian or the Attorney General as his successor as the context may require.

the above treaty provision, which provision, moreover, they construe as an undertaking by the German government to indemnify any American national who suffered loss as a result of suit by German nationals.[3]

1. Paragraph 2 of the Annex to Article 297 of the Treaty of Versailles has been consistently construed by the courts merely as barring the enforcement of—*i.e.*, providing a defense to—claims by Germany or its nationals against the United States or its nationals on account of actions under color of the Trading With the Enemy Act and other exceptional war measures. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Klein* v. *Palmer*, 18 F. 2d 932, 933 (C.A. 2); *Jenny and Hedwig R.* v. *Belgian State*, *Annual Digest of Public International Law Cases* 1938–1940, Case No. 123, p. 377. There is no authority to support the view that the paragraph obligates Germany to indemnify Americans who suffered losses as a result of actions by German nationals over which Germany might have no control.

2. Moreover, there is no merit to the contention that the omission for which Trent was surcharged—*i.e.*, its failure to institute Section 9 proceedings—was "under or in accordance with" the Trading With the

[3] Ten months prior to its appointment as trustee, Trent was appointed depositary for the Alien Property Custodian under Section 12 of the Trading With the Enemy Act, 50 U.S.C. App. 12. In the original trust litigation, Trent maintained that its failure to recover possession of the trust shares was justified by its powers and duties as depositary for the Custodian. *Estate of Isenberg*, 28 Haw. 590 (1925). This argument was rejected by the Ninth Circuit and is not raised in the present petition.

Enemy Act. The basis for Trent's liability was clearly stated in the opinion on rehearing by the Court of Appeals for the Ninth Circuit (*Isenberg* v. *Trent Trust Co.*, 31 F. 2d 553, 554–555):

> Speaking generally, the ground or basis of the decision adverse to the appellee was that it was its plain duty, upon its appointment as trustee of the Isenberg trusts, to institute proceedings under the Trading With the Enemy Act for the recovery of the shares of stock here involved, and that its failure so to do resulted in the sale of the stock by the Alien Property Custodian, and its consequent loss to the *cestuis que* trust * * *. The controlling facts were that the trustee had wilfully and negligently failed to reduce the trust property to possession, and had suffered it to be sold by another, to the detriment of the beneficiaries. * * *

It is plain that the breach of trust for which Trent was held liable consisted not in having *complied* with the Act, but rather in having neglected to take advantage of a procedure which the Act made available. Petitioners urge (Pet. 8–9) that it would have been futile for Trent to bring a Section 9 suit to recover the property, since it is established that a non-enemy American fiduciary may not recover even its legal interest in a corpus held for enemies. *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848 (C.A. 2, 1925); *Manufacturers Trust Co.* v. *Kennedy*, 291 F. 2d 460, 469 (C.A. 2, 1961). However, as of January 1919, when the sale of the trust shares by the Custodian took place, it was by no means clear that an action by an American trustee for German beneficiaries

would have been unavailing, as the *Hicks* case, *supra*, had not yet been decided. And, since Section 9 expressly requires the Custodian to retain the property in his custody *pendente lite*, the mere bringing of the suit would have prevented the sale at the depressed prices prevailing on the January 1919 date. In any event, the Ninth Circuit, in upholding the imposition of a surcharge, impliedly concluded that Trent might have been successful in recovering the trust shares had it made the attempt.[4] This holding, we think, is binding on petitioners here. See *Bruszewski* v. *United States*, 181 F. 2d 419, 422 (C.A. 3); *United Banana Co.* v. *United Fruit Co.*, 172 F. Supp. 580, 588 (D. Conn.); *Bernhard* v. *Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P. 2d 892, 895.

3. Petitioner's complaint, in effect, is that the Ninth Circuit in 1928 erred in surcharging Trent for its failure to prevent the sale of the trust shares at an unreasonably low price. They admit, however (Pet. 8), that "through inadvertence of counsel" the possible defense of the Treaty of Versailles was not raised in the trust litigation, nor indeed, apparently, until the briefing of the question in this Court in 1929.[5] Obviously, errors of counsel in the trust litigation may not be corrected in a collateral proceeding

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[4] The Ninth Circuit decided that the trust shares had not been effectively seized by Trent in its capacity as depositary of the Custodian, see fn. 3, *supra*, and therefore (by implication) that Trent, as trustee, might have obtained return of the shares by filing a Section 9 suit. *Isenberg* v. *Trent Trust Co.*, *supra*, 26 F. 2d at 612–613.

[5] See fn. 1, *supra*, p. 2.

more than thirty years later. As the court below correctly pointed out, "[w]hether or not the Ninth Circuit properly imposed liability on Trent is not and cannot be in issue here." 307 F. 2d at 176.

The decision below is plainly correct. There is no conflict of decisions, and the circumstances of the case are unique, presenting no question of general public importance. The petition for certiorari should be denied.

Respectfully submitted.

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